Supreme Court of the United States

OCTOBER TERM, 1952.

No. 258

THE BALTIMORE AND OHIO RAILROAD COMPANY, BOSTON AND MAINE RAILROAD, ERIE RAILROAD COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS.

Appeal from the United States District Court for the Eastern District of Missouri.

BRIEF FOR THE BALTIMORE AND OHIO RAILROAD COMPANY, BOSTON AND MAINE RAILROAD, ERIE RAILROAD COMPANY, ET AL., APPELLANTS IN NO. 258.

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OPINIONS BELOW.

The opinion of the specially constituted District Court of three judges (R. 145-149) is reported at 105 F. Supp. 631.

The initial report and the further report of the Interstate Commerce Commission (R. 9-47, 60-68) are reported at 279 I.C.C. 671 and 284 I.C.C. 206.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, § 1253 and 2101(b), 62 Stat. 928, 961, 63 Stat. 104. The final decree of the District Court (R. 145-149) was entered June 18, 1952. The petition for appeal (R. 149-151) was filed July 3, 1952, and the order allowing appeal (R. 151-152) was entered on July 3, 1952. Probable jurisdiction was noted by this Court on October 13, 1952 (R. 155).

QUESTIONS PRESENTED.

1. Appellants did not raise the issue of confiscation in the initial hearings in a rate proceeding before the Interstate Commerce Commission, but did raise the issue as soon as the Commission by order prescribed rates alleged to be confiscatory, through the filing of petitions for reconsideration and further hearing. These petitions were denied and appellants brought suit in a specially constituted United States District Court to set aside the Commission's order on the ground that it was confiscatory. Are appellants entitled in that suit to a hearing on, and a judicial determination of the issue of confiscation?

2. In the circumstances stated, if appellants are entitled to a hearing on, and a judicial determination of, the issue of confiscation, is that hearing and determination to be limited to an appraisal of the evidence which was introduced in the initial hearings before the Commission, or are appellants entitled to a hearing before the Court on that evidence which the Commission declined to receive when it denied the petitions for reconsideration and further hearing?

3. In the circumstances stated, does correct practice require that the District Court remand the administrative

question of railroad costs of service to the Commission for its preliminary and expert appraisal?

STATUTES INVOLVED.

This appeal involves the following statutory and constitutional provisions which are set forth in full in the appendix hereto; Section 15(1) of the Interstate Commerce Act, Title 49, U.S. Code, § 15(1), 41 Stat. 484-485, 48 Stat. 1102, 49 Stat. 543, 54 Stat. 911; Section 1(5) of the Interstate Comerce Act, Title 49, U. S. Code, § 1(5), 54 Stat. 900, 63 Stat. 485; and the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE.

This cause had its origin in a proceeding instituted by the complaint of the appellee, Texas Citrus and Vegetable Growers and Shippers (hereinafter referred to as "Texas"), designated as No. 30074 on the docket of the Interstate Commerce Commission. Assailed as being in violation of Section 1(5) of the Interstate Commerce Act were the rates and charges published by appellants and other common carriers by railroad for application to vegetables transported from the State of Texas to various destinations in the United States. After a hearing, the issuance of an Examiner's proposed report to which both appellants and Texas filed exceptions, and oral argument, the Commission, four Commissioners dissenting, by its order of December 21, 1950, in purported exercise of its powers under Section 15(1) of the Interstate Commerce Act, prescribed maximum reasonable rates on certain vegetables for application in the future (R. 9-47).

Appellants thereafter filed a petition with the Commission for reconsideration and further hearing (R. 48-58) which petition included detailed statements showing that

the rates prescribed, if made effective, would produce revenues many hundreds of thousands of dollars less than their costs of operation and thus would cause confiscation of appellants' property in violation of the Fifth Amendment to the Constitution of the United States. Appellants sought the opportunity on further hearing to offer such evidence in support of their claim of confiscation (R. 50-51, 54-58). The Commission did grant reconsideration on the record as made but denied the petition for further hearing (R. 59). On January 7, 1952, the Commission issued its further report and order modifying its former findings "principally as to form," five Commissioners dissenting on the ground that the prescribed rates were "lower than the record warrants". (R. 60-68). On February 15, 1952, appellants again requested the Commission by petition to grant further hearing to afford appellants the opportunity to prove their claim of confiscation (R. 69-72). This petition was denied by the Commission on March 7, 1952 (R. 81). Thereupon, appellants filed their action in the District Court claiming that confiscation would result from the order of the Commission and seeking its annulment (R. 1-81).

Appellants, by their complaint, as amended, requested a hearing so as to permit a judicial determination of their claim of confiscation. Appellants stated in their complaint that the rates prescribed by the Commission would yield to the carriers affected thereby, including appellants, and to each of them, revenue less than the costs of providing the service covered by said rates (R. 7, 79). Appellants pointed out that such cost evidence did not exist in the record before the Commission, save as stated in appellants' petitions for reconsideration and further hearing (R. 6-7, 78). It was stated further that such cost evidence was not made a part of the record before the Commission

since appellants and other carriers "did not and could not foresee that confiscatory rates would be prescribed by the Commission in its orders" (R. 6-7, 78). But appellants also stated in their complaint that cost evidence necessary for the judicial determination of the issue of confiscation would be introduced in the hearing before the District Court (R. 8, 79-80).

Appellants, after the filing of their complaint, moved that the District Court stay its hand, and remand the cause to the Commission for the sole purpose of obtaining the Commission's preliminary and expert determination of the costs of performing the service for which the rates had been prescribed (R. 96-108).

Appellees contemporaneously filed motions to dismiss (R. 83-95).

The District Court thereafter denied appellants' motion to stay and remand and entered an order dismissing the complaint (R. 145-149).

The District Court held that the appellants were not entitled to introduce cost evidence before the court in support of the claim of confiscation. The court also denied the appellants' motion to stay the proceeding in the District Court and to remand the administrative question of railroad costs of service to the Commission for its preliminary and expert appraisal. The action of the District Court both in refusing to receive appellants' evidence and in overruling appellants' motion to stay and remand was based on the ground that the evidence bearing on the issue of confiscation "should have been submitted to the Commission in the initial hearing but was not." (R. 145-149). Appellants therefore have not had a hearing in any forum on, or a judicial determination of, the issue of confiscation. The case is here on direct appeal from the order of the District Court.

SPECIFICATION OF ERRORS.

Appellants rely upon all the errors assigned in their Assignment of Errors (R. 152-153). These errors are:

1. The Court erred in sustaining appellees' motions to dismiss.

2. The Court erred in overruling appellants' motion to stay and remand.

3. The Court erred in dismissing the cause.

4. The Court erred in concluding as a matter of law that appellants had no right to a hearing at which they could introduce evidence of confiscation after the Interstate Commerce Commission entered its order of January 7, 1952.

5. The Court erred in denying appellants an injunction setting aside, annulling, suspending and perpetually enjoining the enforcement, operation and execution of said order of January 7, 1952.

6. The Court erred in failing to retain jurisdiction, stay its proceedings and remand the cause to the Interstate Commerce Commission for an administrative determination of the costs of transporting the vegetables for which the rates were prescribed in said order of January 7, 1952.

SUMMARY OF ARGUMENT.

The complaint in the District Court alleged that the Commission's order would require the publication of rates which would produce for appellants and for each of them, "revenues less than the costs of providing the service covered by said rates" (R. 7, 79). This allegation, among others, must be taken as true on the motion to dismiss. *Anti-Fascist Committee* v. *McGrath*, 341 U. S.

123, 126. That appellants' costs are greater than the revenues produced by the prescribed rates thus establishes for the purposes of this proceeding the fact of confiscation of appellants' property. *Nor. Pac. R. Co.* v. *North Dakota*, 236 U. S. 585, 604.

The District Court, by its order of dismissal, thus admits the existence of confiscation for the purpose of this proceeding but would permit its continuance on the ground that "the pertinent evidence bearing on the issue of confiscation should have been submitted to the Commission in the initial hearing but was not" (R. 149). The District Court overlooks the allegations in the complaint that the evidence necessary to support the claim of confiscation was not a part of the record before the Commission. Appellants "did not and could not foresee that confiscatory rates would be prescribed by the Commission in its orders" (R. 6-7, 78). These facts must also be taken as true on the motion to dismiss.

The District Court by its order of dismissal has deprived appellants of their right to a hearing and judicial determination of the issue of confiscation to which they lawfully are entitled. *St. Joseph Stock Yards Company* v. *U. S.*, 298 U. S. 38, 51-52. The position of the District Court is premised upon the wrongful assumption that confiscation can only be proven upon the basis of facts contained in the initial record before the Commission even though correct practice had been followed before the Commission so as to preserve this issue for judicial determination. Where the sole issue presented was whether or not the order was confiscatory, it was not necessary that appellants even offer in evidence the initial record before the Commission. *Prendergast* v. *New York Teleph. Co.*, 262 U.S. 43, 50. Appellants' action in filing two petitions for reconsideration and further hearing with the Commission, (R. 48-58, 69-72), both of which were

denied by it (R. 59, 81), constituted "appropriate and desirable" practice for the preservation of the issue of confiscation after a hearing thereon for determination by the District Court. *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 371-372.

The District Court discarded the precedent of *B. & O. R. Co.* v. *United States,* 298 U. S. 349, on the ground that it "involved the division among carriers of the revenue from admitted reasonable rates" and was not a rate case (R. 148). The distinction drawn by the District Court and its reliance placed upon *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 489, is not sound. The statutory language for Commission establishment by order of both rates and divisions is virtually the same. No distinction is drawn in *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 357, between rate and divisions cases where confiscation is the issue.

Three other cases are relied upon by the District Court (R. 148). *Alabama Comm'n* v. *Southern R. Co.,* 341 U. S. 341, 348 is expressly grounded upon *New York* v. *United States,* 331 U. S. 284, 334-336. This latter case in turn refers expressly to *B. & O. R. Co.* v. *United States,* 298 U. S. 349, without suggesting therein that there is any difference between a case involving rates and one involving divisions. *United States* v. *Capitol Transit Co.,* 338 U. S. 286, cited by the District Court is not in point since in that case, the issue of confiscation had not been properly raised before the Commission.

New York v. *United States,* 331 U. S. 284, also cited by the District Court (R. 147-148), but relied upon in fact by appellants in support of their position, establishes firmly that under present practice, the District Court should have remanded the cause to the Commission for a preliminary appraisal of the evidence of costs in accordance with appel-

lants' motion to remand. In that proceeding, new cost evidence was also tendered and received by the District Court on the issue of confiscation. The Supreme Court in reviewing this practice stated "that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question" (p. 334). This is precisely what these appellants sought by their motion to stay and remand which was denied by the court below.

The practice which appellants followed was "appropriate and desirable" in raising the issue of confiscation before the Commission. Appellants could not and did not, as alleged in their complaint, foresee that the Commission would exceed its authority in the prescription of confiscatory rates (R. 6-7, 78). Should the precedent of *B. & O. R. Co.* v. *United States*, 298 U. S. 349, be discarded in favor of the position taken by the District Court, a change in Commission procedure would necessarily result since the only method by which litigants such as these appellants could safeguard their constitutional rights would be through the introduction of cost evidence in all rate proceedings—a practice based upon the necessary assumption that the Commission will exceed its authority by the prescription of confiscatory rates. Such an assumption is directly contrary to the normal presumption that the Commission will not exceed its authority. Further, the position taken by the District Court, upon the motion to dismiss, necessarily assumes the establishment of confiscation, resulting from the Commission's order. Not only therefore does the order of the District Court result in the discard of sound precedent but it also permits the continuance of established confiscation without even the opportunity of a hearing for appellants. The District Court erred.

ARGUMENT.

I.

Final Determination of the Issue of Confiscation Resulting from an Order of the Interstate Commerce Commission Is a Judicial Question for the District Court.

This Court has long held that the determination of the issue of confiscation is one for the courts. Typical of many of the decisions of this Court which have so held is *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 51-52 where the following is stated:

> But the Constitution fixes limits to the rate-making power prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny of determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clear-

> ly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.

See also *New York* v. *United States,* 331 U. S. 284, 334-336; and *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 364. In an exhaustive review of the precedents, including the applicable decisions of this court, the Supreme Judicial Court of Massachusetts has recently held that the issue of confiscation is a judicial question to be decided by the courts. *Opinion of the Justices,* ..... Mass. ....., 106 N.E. (2d) 259 (decided April 30, 1952).

The cases cited herein thus should assure appellants of the right to a judicial determination of the issue of confiscation. The effect of the order of the District Court is to deny appellants all opportunity to secure a hearing at which their claim of confiscation could be presented for such judicial determination. For the purposes of the motion to dismiss, the allegation of confiscation must be taken to be true. This means the judgment of the District Court sanctions the imposition of admittedly confiscatory rates and does so on the purely procedural and technical ground that the appellants should have raised the issue of confiscation in the initial hearing before the Commission. This result follows even though appellants, following correct practice did attempt in two petitions for reconsideration and further hearing, and in their complaint in the District Court to secure the opportunity to present evidence which would show confiscation resulting from the Commission's order. Should the opinion of the District Court stand, it will accomplish an unduly harsh result in its reversal of long standing precedent.

II.

Judicial Determination of the Issue of Confiscation Resulting to Appellants from the Commission's Order Is Not Limited to an Appraisal of the Evidence Which Was Introduced in the Initial Hearings before the Commission.

The District Court found that appellants should have introduced their evidence of confiscation at the initial hearings before the Commission and prior to the issuance of the allegedly confiscatory order. Since this was not done, appellants were found to be forever foreclosed of their constitutional rights. The District Court found in effect that its efforts were confined to the record taken at the initial hearings before the Commission (R. 149). In *Prendergast* v. *New York Teleph. Co.*, 262 U. S. 43, 50, this Court held that where the sole issue presented was whether or not the order was confiscatory, it was not necessary that appellants even offer in evidence the initial record before the Commission. The District Court took its position despite the fact that appellants in every way conformed to what had been described by this Court as being "practice appropriate and desirable" to raise the issue of confiscation and preserve it for Court review. See *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 371-372, and *New York* v. *United States*, 331 U. S. 284, 334-336.

In both *B. & O. R. Co.* v. *United States*, 298 U. S. 349, and the instant case, hearings were held before an examiner, proposed reports were issued to which both parties filed exceptions, final reports were issued by the Commission, and thereafter, petitions were filed seeking reconsideration and further hearing upon the ground that the orders of the Commission, if made effective, would cause confiscation in violation of constitutional rights (R. 48-58, 69-72). The Commission denied the petitions for

further hearing (R. 59, 81). But the District Court in *B. & O. R. Co.* v. *United States,* 298 U. S. 349, when the order of the Commission was there attacked, permitted the introduction of new cost evidence at the hearing before it to show claimed confiscation so as to permit judicial determination of that issue. This Court held that this was proper and that the failure to invoke constitutional protection in the initial hearings before the Commission and prior to the issuance of the allegedly confiscatory order did not bar the suit. The Court held that the petitions which were filed for further hearing on the confiscation issue constituted practice which was "appropriate and desirable as indicated in *Manufacturers' Ry. Co.* v. *United States,* 246 U. S. 457" so as to preserve that issue on hearing for judicial determination. Since appellants followed this same approved practice, step by step, the District Court should have made a similar finding here.

The basis of the Supreme Court's finding, and what should have been the basis to the finding of the District Court is stated thus (298 U. S. 349, 370, 371-372):

> "They could not foresee that confiscatory restitution would be required or that confiscatory divisions would be prescribed; they were not bound, in advance of the commission's finding and report, to set up a fear of transgression of their constitutional rights. Presumably the commission would keep within the law.
>
> * * *
>
> The appellants were not given and could not obtain a hearing before the commission upon the question of confiscation. Their failure earlier to invoke constitutional protection does not bar this suit. That they diligently sought relief from the commission is shown in the latter's brief here in which, justifying or explaining its denial of the second petition for

rehearing, it says: 'When the Commission denied the second petition, it already had before it and had considered the proffered evidence in support of the claim of confiscation that appellants desired it to consider, as well as the entire record of the previous hearings, much of the testimony in which consisted of cost calculations and other statistical data offered by the appellants.' Appellants conformed to practice appropriate and desirable as indicated in *Manufacturers R. Co.* v. *United States,* 246 U. S. 457, 489, 62 L. ed. 831, 847, 38 S. Ct. 383, and recently expounded in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, ante, 1033, 56 S. Ct. 720."

Note the specific reference to *Manufacturers' Ry. Co.* v. *United States,* 246 U. S. 457, 489, which is erroneously relied upon by the District Court in its opinion. Appellants here properly raised the confiscation issue in their petitions for further hearing before the Commission in precisely the same manner as was approved in *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 370-372. The District Court should here have permitted a hearing for the introduction of evidence by appellants in support of their claim of confiscation.

The District Court attempted to distinguish *B. & O. R. Co.* v. *United States,* 298 U. S. 349, on the ground that it involved divisions and for that reason was "not in point in this proceeding" (R. 148). But the statutory language defining the powers of the Commission in the establishment of both rates and divisions is virtually the same.* See 49 U.S.C. Sec. 15(1) and Sec. 15(6); 41 Stat. 1102, 49 Stat. 543, 54 Stat. 911, and 41 Stat. 486. And this is confirmed by *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 357, where both rate and divisions cases for the purposes of confiscation are treated alike, the Court stating

* Rates: "just and reasonable"; divisions: "just, reasonable, and equitable".

> "But this does not imply that, without regard to amount, the carriers are bound to accept prescribed divisions. *Congress is without power, directly or through the commission, to require them to serve the public at rates that are confiscatory. When made in accordance with the Act, the commission's orders prescribing divisions are the equivalent of Acts of Congress requiring the carriers to serve for the amounts specified.* Taken, as they must be, in connection with the duties to the public imposed by law upon the carriers, they command service and for that purpose expropriate the use of carriers' property (Emphasis supplied).

The distinction made by the District Court is not sound. No sound reason exists for a difference in court treatment between rate and divisions cases where the issue of confiscation has been properly raised before the Commission. Appellants did conform to correct practice in this rate case in raising the issue of confiscation in their petitions for further hearing in which the opportunity to show confiscation was sought.

New York v. *United States*, 331 U. S. 284, another case relied upon by the District Court, refers expressly to *B. & O. R. Co.* v. *United States*, 298 U. S. 349, without suggesting that there is any difference between a case involving rates and one involving divisions. In *New York* v. *United States*, 331 U. S. 284, 334-336, this Court, just as it did also in *St. Joseph Stock Yards Company* v. *U. S.*, 298 U. S. 38, treated *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, as establishing the principle that a litigant in a rate case is entitled to an opportunity to present evidence on the issue of confiscation after the confiscatory order is entered. In fact, *New York* v. *United States*, 331 U. S. 284, 334-336, establishes firmly that under present practice, the District Court should have

retained jurisdiction and remanded the cause to the Commission for the purpose of determining the administrative issue of costs in accordance with appellants' motion to remand. In that proceeding, new cost evidence was also tendered and received by the District Court on the issue of confiscation. The Supreme Court in reviewing this practice stated "that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question" (p. 334). This is precisely what these appellants sought by their motion to stay and remand which was denied by the court below.

Alabama Comm'n v. *Southern R. Co.*, 341 U. S. 341, 348, another case relied upon by the District Court is expressly grounded on *New York* v. *United States*, 331 U. S. 284, which has been discussed hereinbefore. The only other case cited in the opinion of the District Court is *United States* v. *Capital Transit Co.*, 338 U. S. 286, which is not inpoint since in that case the issue of confiscation had not been properly raised before the Commission.

The reliance of the District Court upon the cases cited hereinbefore and its lack of reliance upon the precedents of *B. & O. R. Co.* v. *United States*, 298 U. S. 349, and *New York* v. *United States*, 331 U. S. 284, produces unusual results. The complaint alleges that the Commission's order will require the publication of rates which will produce for appellants and each of them "revenues less than the costs of providing the service covered by said rates" (R. 7, 79). "Where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into ac-

count the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority." *Nor. Pac. Ry. Co.* v. *North Dakota*, 236 U. S. 585, 604. Since, upon a motion to dismiss, the allegations of the complaint must be taken as true, the fact of confiscation resulting from the establishment of the rates prescribed in the assailed order must be here accepted. *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 126. Nevertheless, the order of the District Court permits continuance of the Commission's order which for the purposes of this proceeding causes confiscation.

A second unusual result stems from the erroneous reliance by the District Court upon the precedent set forth in the opinion. Not only was it established in *B. & O. R. Co.* v. *United States*, 298 U.S. 349, 370, that appellants there could not foresee that the Commission would go without the law and require "confiscatory restitution", but appellants' inability here to foresee such results is again established as a matter of fact for the purpose of this proceeding. The complaint states that appellants "did not and could not foresee that confiscatory rates would be prescribed by the Commission in its orders" (R. 6-7, 78). These facts must be taken as true on the motion to dismiss. But following the reasoning of the District Court forward, in all proceedings before the Commission for the future, carriers such as these appellants must foresee in each case that the Commission might exceed its authority under the Constitution. Such an assumption certainly runs contrary to the usual presumption that the Commission will not exceed its authority.

In rate proceedings before the Commission, evidence with respect to costs is not usually necessary and it is not the general practice to introduce such evidence. The Court can note judicially from the 65th Annual Report of the

Commission to the Senate and House of Representatives dated November 1, 1951, that, for the year, the cost-finding section of the Commission performed work only "in connection with 35 formal proceedings before the Commission. This worked involved, in some cases, the preparation and introduction of evidence by members of this section, and in other cases the analysis of cost evidence submitted by other parties. Proceedings included charges on small shipments by railroads and motor carriers, express rates and charges, divisions of joint rates, commutation fares for railroads and bus carriers, switching charges, railway mail-pay rates, unloading charges on fruits and vegetables, and other matters involving rail, motor and barge rates on a variety of individual commodities (p. 78)."* The Commission in the same year disposed of 502 formal cases arising out of complaint and suspension proceedings (p. 82). The reason for the very small amount of formal cases in which the introduction of costs required the services of the cost-finding section of the Commission is that "both the Commission and this Court have consistently rejected any thought that costs should be the controlling factor in rate making." *Alabama G.S.R.Co.* v. *United States*, 340 U.S. 216, 223. The Commission in a very recent case decided October 6, 1952, *Bus Fares Between New York City and New Jersey*, ... M.C.C. ..... (I.&S. M-4058), pointed out that "costs are useful in a determination of the lawfulness of fares but they are not indispensable to such a determination." Costs are thus neither controlling nor indispensable in rate making but costs are both controlling and indispensable in a determination of the issue of confiscation. The very issue presented by a

* The report also indicates that cost data for rate-making and related purposes were submitted to the suspension board in 776 motor and rail cases. These were merely administrative determinations of whether proposed rates or practices should be suspended under Section 15(7) of the Interstate Commerce Act pending a formal investigation and were not formal proceedings in which the Commission issued final orders.

claim of confiscation is whether or not an order of a regulatory body forces the carrier to transport a commodity "for less than the proper cost of transportation or virtually at cost". *Nor. Pac. Ry.* v. *North Dakota,* 236 U.S. 585, 604. Neither Congress nor its agent, the Commission, has the power to make a final determination of this issue of confiscation. *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 52.

The Court knows further from its observations in *New York* v. *United States,* 331 U.S. 284, 328, and from this record (R. 97-99), that the preparation, presentation and evaluation of cost evidence is a task of real complexity. Should the order of the District Court stand, litigants such as these appellants must assume the burden of preparing such complex evidence of costs in every rate proceeding if they are to be fully protected from an invasion of their constitutional rights. Such procedure would obviously not be necessary in most cases but the threat of confiscation without judicial remedy would always be present. Appellants would be forced to assume under the principle adopted by the District Court that the Commission would exceed its powers and prescribe confiscatory rates. Such a practice if forced on appellants and others similarly situated would greatly increase the burden of all litigants, the public and the Commission. Should the order of the District Court thus stand, it will work a reversal of long standing precedent of this Court that litigants such as these appellants can properly raise a claim of confiscation in court and submit evidence of confiscation which may not have been presented to the administrative body. Such would be the case even though litigants had in a timely and proper manner attempted to present evidence to the Commission through petitions for reconsideration and further hearing in support of their claim of confiscation immediately after the issuance of the con-

fiscatory order. Such consequences therefore flow from a discard of the practice which was found to be appropriate and desirable in *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 371-372.

That this appropriate and desirable practice does not lend itself to abuse is shown by the few cases thereafter in which the practice was followed. With no indication therefore of abuse arising from the practice deemed to be "appropriate and desirable" in *B. & O. R. Co.* v. *United States*, 298 U.S. 349, with the safeguard that it affords litigants such as these appellants against the serious consequences of an invasion of their constitution rights without effecting serious changes in Commission procedure, and with the full protection afforded to all parties by judicial direction and control, the practice which these appellants followed in raising the issue of confiscation for judicial determination should be deemed "appropriate and desirable" by this Court.

III.

In a Suit Brought in the District Court Attacking Rates Prescribed by the Commission as Confiscatory, Correct Practice Requires That the District Court Remand the Administrative Question of Railroad Costs of Service to the Commission for Its Preliminary and Expert Appraisal.

Appellants filed with the District Court a motion praying that the Court stay its hand, retain jurisdiction of the cause, and remand it to the Commission for the purpose of obtaining its preliminary and expert appraisal of the costs of railroad service (R. 96-107). The District Court denied this motion (R. 149). Appellees, the United States and the Interstate Commerce Commission, did agree at the hearing held on this motion before the District Court that, should the motion to dismiss be denied, appellants' motion to remand was proper (R. 117).

The basis in the main of appellants' motion to remand was *New York* v. *United States,* 331 U.S. 284, 334-336, where the following was stated:

> The western roads in their petition for rehearing before the Commission raised the confiscation point. But in doing so they rested on the record before the Commission and tendered no additional evidence. In the District Court, however, they presented further evidence which was received over objection and considered by that court.
>
> This, therefore, is not a case like *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, 363, 371, 372, 80 L. ed. 1209, 1221, 1225, 1226, 56 S. Ct. 797, where the Commission refused to receive evidence proffered on the point of confiscation. Here, as we have said, the Commission received all evidence that was offered; and when its order was announced and made known and the petition for rehearing was filed, the opportunity to tender additional evidence to bolster the confiscation point was not accepted. As stated in *Manufacturers R. Co.* v. *United States,* 246 U.S. 457, 489, 490, 62 L. ed. 831, 847, 848, 38 S. Ct. 383, and in *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 53, 54, 80 L. ed. 1033, 1042, 1043, 56 S. Ct. 720, correct practice requires that, where the opportunity exists all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance and should not be received by the District Court as though it were conducting a trial *de novo.* The reason is plain enough. These problems of transportation economics are complicated and involved. For example, the determination of transportation costs and their allocation among various types of traffic is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated. Moreover, the impact of a particular order on revenues and the ability of the enterprise to thrive under it are matters for judgment on the part of those

who know the conditions which create the revenues and the flexibility of managerial controls. For such reasons, we stated in *Board of Trade* v. *United States*, 314 U.S. 534, 546, 86 L. ed. 432, 442, 62 S. Ct. 366:

"The process of rate making is essentially empiric. The stuff of the process is fluid and changing— the resultant of facts that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

Thus we think that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question. (Emphasis supplied)

See also *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U.S. 422, 432; and *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 147.

The District Court should determine the constitutional issue of confiscation. But it is admitted that this issue, particularly when it involves the complexities of costs of railroad service, can place an undue burden upon the business of the court. This in particular was the subject of comment by Mr. Justice Brandeis in his concurring opinions in *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U.S. 38, 84-93; and *B. & O. R. Co.* v. *United States*, 298 U.S. 349, 381-382, 387. It was for this very reason that this Court in *New York* v. *United States*, 331 U.S. 284, 334-336, held that a remand to the Commission for "a further preliminary appraisal of the facts" would have been proper. This procedure avoids the imposition of any burden upon the District Court and still preserves judicial review of the issue of confiscation. In *Opinion of the Justices*, ... Mass. ....., 106 N.E. (2d) 259, 264-266, the Supreme

Judicial Court of Massachusetts, as did this Court in *New York* v. *United States*, 331 U.S. 284, 334-336, held that such procedure was proper in the safeguard of constitutional rights. Such a procedure removes any practical difficulties in the assumption by the Court of the admittedly difficult task of judicial determination of complex factual issues. The facilities of the Commission are readily available. Practicality and precedent thus support appellants' motion to stay and remand.

CONCLUSION.

The judgment of the District Court should be reversed and the cause remanded to that Court with directions to retain jurisdiction thereof so as to determine the issue of confiscation resulting from the Commission's order; and that the District Court further should be directed to remand in turn the cause to the Commission for the purpose of obtaining its preliminary and expert appraisal of railroad costs of service covering the rates of which annulment is sought.

Respectfully submitted,

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APPENDIX.

Section 15(1) of the Interstate Commerce Act, Title 49, U.S. Code, § 15 (1), 41 Stat. 484-485, 48 Stat. 1102, 49 Stat. 543, 54 Stat. 911, reads as follows:

"That whenever, after full hearing, upon a complaint made as provided in Section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist; and shall not thereafter publish demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the

maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 1(5) of the Interstate Commerce Act, Title 49, U. S. Code, § 1(5), 54 Stat. 900, 63 Stat. 485, reads as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

The Fifth Amendment to the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."